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Nos. 94-631, 94-797, 94-929

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, ET AL.
*Appellants,*

v.

DAVIDA JOHNSON, ET AL.
*Appellees.*

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LUCIOUS ABRAMS, JR., ET AL.
*Appellants,*

v.

DAVIDA JOHNSON, ET AL.
*Appellees.*

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UNITED STATES
*Appellant,*

v.

DAVIDA JOHNSON, ET AL.
*Appellees.*

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**On Appeal from the United States District Court for the Southern District of Georgia**

## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

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## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE BY THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

The Georgia Association of Black Elected Officials ("GABEO") hereby moves for leave to file a brief *amicus curiae* in the above-captioned cases.

GABEO is an organization of African Americans elected to public office in Georgia at the congressional, state, and local levels. GABEO is approximately 25 years old and has

more than 700 members. Its basic purposes are to promote excellence in public officials and inclusiveness in government. Throughout its history GABEO has supported the adoption of non-dilutive methods of election that ensure the full participation of all persons in the political and electoral processes.

GABEO has obtained the consent of counsel for the appellants in all three cases. Letters reflecting that consent have been filed with the Clerk of the Court. Counsel for appellees have refused to give their consent; however, they have informed counsel for GABEO that they will not oppose GABEO's motion for leave to file its brief.

GABEO's members and the constituents they represent may be directly affected by the decision of the Court in these cases. Its brief presents several important issues that have not been fully addressed by the parties. First, GABEO's brief explains why the broad reading of this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2618 (1993), offered by the court below runs afoul of the equal protection component of the Due Process Clause of the Fifth Amendment -- an argument not addressed, to our knowledge, by any of the parties. Second, GABEO's brief approaches both the question of appellees' standing and the differences between race consciousness in the districting process and race consciousness in other governmental decisionmaking from a different perspective than that taken by the parties.

WHEREFORE, GABEO moves that the Court permit the filing of its brief.

Respectfully submitted,

_____

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Georgia Association of Black
Elected Officials

Dated: February 21, 1995

# TABLE OF CONTENTS

*Page*

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Interest of Amicus Curiae . . . . . 1

Summary of Argument . . . . . 2

Argument

I. *Shaw v. Reno* Identified a Narrow Class of Exceptional Cases in Which Federal Judicial Intervention into the Political Processes of Redistricting Is Justified . . . . . 5

II. The Differences Between Apportionment and Other Governmental Decisions Show Why Race Can Legitimately Be Taken Into Account in Drawing District Lines . . . . . 12

III. *Shaw v. Reno* Must Be Read Narrowly to Avoid Denying African Americans the Equal Protection of the Laws Guaranteed by the Fifth Amendment . . . . 18

Conclusion . . . . . 21

# TABLE OF AUTHORITIES


| | *Pages* |
|---|---|
| *Cases* | |
| *Allen v. Wright*, 468 U.S. 737 (1984) . . . . . | 3, 10 |
| *Baker v. Carr*, 369 U.S. 186 (1962) . . . . . | 6, 14 |
| *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983) . . . . . | 6 |
| *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) . . . . . | 14 |
| *Davis v. Bandemer*, 478 U.S. 109 (1986) . . . . | 2 *passim* |
| *Dickinson v. Indiana State Election Bd.*, 817 F. Supp. 737 (S.D. Ind. 1992) . . . . . | 17 |
| *Edmonson v. Leesville Concrete Co.*, 500 U.S. 616 (1991) . . . . . | 21 |
| *Gaffney v. Cummings*, 412 U.S. 735 (1973) . . | 9, 13 |
| *Growe v. Emison*, 113 S.Ct. 1075 (1993) . . . . | 5 |
| *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (3-judge court), *probable juris. noted*, Nos. 94-558 and 94-627 . . . . . | 21 |
| *Hunter v. Erickson*, 393 U.S. 385 (1969) | 4, 18-19, 21 |
| *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994) . | 2, 5 |

*Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994) (3-judge court) . . . . . 7

*Ex parte Levitt*, 302 U.S. 633 (1937) . . . . . 10

*Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) . . . . . 3, 9

*LULAC v. Clements*, 999 F.2d 831 (5th Cir) (en banc), *cert. denied*, 114 S Ct 878 (1994) . . . 17

*Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) . . . . . 13

*Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) 3-judge court), *aff'd*, 113 S.Ct. 30 (1992) . . . 18

*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) . . . . . 14

*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) . . . . . 12

*Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (3-judge court) . . . . . 18

*Shaw v. Reno*, 113 S.Ct. 2816 (1993) . . . . . 2 *passim*

*Thornburg v. Gingles*, 478 U.S. 30 (1986) . . . 5, 8

*United States v. Richardson*, 418 U.S. 166 (1974) . . . . . 3, 10-11

*Voinovich v. Quilter*, 113 S.Ct. 1149 (1993) . . 5

*Whitcomb v. Chavis*, 403 U.S. 124 (1971) . . . 2, 15

*Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986) . . . . . 14, 15

*Constitutional and Statutory Provisions*

U.S. Const., amend. V . . . . . 4, 20-21

U.S. Const., amend. XIV . . . . . 20

Civil Rights Act of 1964 (codified as amended in scattered sections of 42 U.S.C. (1988)) . . . 16

Civil Rights Act of 1991 (to be codified in scattered sections of 42 U.S.C.) . . . . . 16

Equal Employment Opportunity Act of 1972, (codified in 42 U.S.C. § 2000e (1988) . . . . 16

Fair Housing Act of 1968 (codified as amended at 42 U.S.C. § 3601 et seq. (1988)) . . . . . 16

Fair Housing Amendments Act of 1988 (to be codified at 42 U.S.C. § 3601 et seq.) . . . . . 16

Voting Rights Act of 1965, (codified as amended at 42 U.S.C. § 1973 et seq. (1988)) . . . . . 16

Voting Rights Act Amendments of 1982 (codified at 42 U.S.C. § 1973 et seq. (1988)) . . . . . 16

*Other Materials*

T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 Mich. L. Rev. 588 (1993) . . . . . 13

Pamela S. Karlan, *The Rights To Vote: Some Realism About Formalism*, 71 Tex. L. Rev. 1705 (1993) . . . . . 13

Pamela S. Karlan, *Undoing the Right Thing: Single Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1 (1991) . . . . . 15

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993) . . . . . 20

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) . . 10

S. Rep. No. 92-415, p. 10 (1971)) . . . . . 16

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**On Appeal from the United States District Court for the Southern District of Georgia**

## BRIEF OF AMICUS CURIAE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

## INTEREST OF AMICUS CURIAE

The Georgia Association of Black Elected Officials ("GABEO") is an organization of African Americans elected to public office in Georgia at the congressional, state, and local levels. GABEO is approximately 25 years old and has

more than 700 members. Its basic purposes are to promote excellence in public officials and inclusiveness in government. Throughout its history GABEO has supported the adoption of non-dilutive methods of election that ensure the full participation of all persons in the political and electoral processes.

## SUMMARY OF ARGUMENT

This Court has long accepted the proposition that redistricting inevitably takes into account the competing claims of political, ethnic, racial, and socioeconomic groups. *See, e.g., Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994); *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). What distinguished the post-1990 round of reapportionment from its predecessors was not the sudden emergence of race consciousness but rather the unprecedented integration of Southern congressional delegations. This integration was achieved wholly by the state and federal political branches, without the need for direct judicial intervention.

Nothing in this Court's decision in *Shaw* was intended to reverse this development or to give the lower courts a warrant to upset the results of the political process of redistricting, especially when that process has neither denied nor diluted any individual's right to vote. *Shaw* should be read narrowly -- to permit lawsuits challenging the creation of majority-nonwhite districts *only* when the shape of such districts represents a clear deviation from the kind of districts the state has drawn for other politically cohesive groups *and* threatens either to exacerbate racial bloc voting or to deny members of the racial minority within a district fair

representation. The Court should also take this opportunity to make clear that *Shaw* did not suspend the normal rules for standing: a plaintiff who alleges nothing more than a generally available claim that the government has not complied with the Constitution cannot bring suit. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *United States v. Richardson*, 418 U.S. 166 (1974).

*Shaw* did not hold that all race-conscious districting was either impermissible or subject to heightened scrutiny. The Court should take this opportunity to reiterate that proposition. Districting differs from other governmental activity in four critical respects that explain why race-consciousness here cannot be subjected to the same type of strict scrutiny accorded other race-conscious action.

First, the very purpose of apportionment is to treat voters as members of *groups*; thus the usual alternative to group-based treatment -- individualized decisionmaking -- is unavailable.

Second, unlike most other contexts, there are no objective, neutral, or merit-based criteria that provide judicially discoverable and manageable standards for selecting particular district lines.

Third, given decennial reapportionment and the inherently partisan and subjective nature of the process, an individual voter has no settled, legally cognizable expectation of being placed in any particular district.

Fourth, as *Shaw*'s statement about the inevitable awareness of race in American politics implicitly recognizes, racial affiliation often describes politically cohesive communities of interest. In contemporary America, it may

be impossible fairly to represent ostensibly "political" interests if ethnicity is ignored. Race often serves as a shorthand or organizing principle for political communities. Given the intertwining of race and politics, a rule that treats all race-conscious districting with suspicion would raise serious questions of administrability: it would demand that federal courts artificially distinguish between race-based and political motivations.

Moreover, such a radical expansion of *Shaw* would raise a serious constitutional question. Decisions like the one below and in parallel cases from Texas and Louisiana make it more difficult for black voters to secure advantageous districts than for other voters to do so. Requiring regularity of boundaries for majority-nonwhite districts but not for majority-white districts constrains the options available to racial minorities in ways that other groups' options are not constrained. This approach turns the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries. As such, it would run afoul of this Court's decision in *Hunter v. Erickson*, 393 U.S. 385 (1969), and the equal protection component of the Due Process Clause of the Fifth Amendment.

# ARGUMENT

## I. *Shaw v. Reno* Identified a Narrow Class of Exceptional Cases in Which Federal Judicial Intervention into the Political Processes of Redistricting Is Justified

This Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), should be understood in the context of the other voting rights cases of the 1992 Term. That same Term, this Court unanimously declined to strike down two other state apportionments, despite the fact that both processes were explicitly race-conscious and despite the fact that, in Ohio, the legislature explicitly and intentionally drew district boundaries to create majority-black constituencies. *See Growe v. Emison*, 113 S.Ct. 1075 (1993); *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Moreover, *Shaw* was decided against the backdrop of this Court's repeated holdings that "the power to influence the political process is not limited to winning elections," *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *see also Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring in the judgment); *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). And subsequent to *Shaw*, this Court once again recognized that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts." *Johnson v. DeGrandy*, 114 S.Ct. 2647, 2661 (1994).

The 1990 round of reapportionment reflected the increased ability of minority voters to "pull, haul, and trade," *Johnson*, 114 S.Ct. at 2661, in the intensely partisan world of redistricting. Some of the bargaining and horsetrading was purely internal to state legislatures, where representatives of the black community now sit in unprecedented numbers. Sometimes the minority community gained additional

leverage from the national political consensus that extended and amended the Voting Rights Act of 1965 and required federal preclearance for states like Georgia with a history of excluding black voters from the redistricting process. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (recounting the overt racism in Georgia's post-1980 congressional reapportionment), *aff'd*, 459 U.S. 1166 (1983). The results of the 1990 reapportionment are more than impressive: for the first time since Reconstruction, the legislative delegations of Southern states are racially integrated. More significantly, this long-desired, and long-resisted, integration was accomplished by the state and federal political branches, without the need for judicial intervention. The 1982 amendments and extension of the Voting Rights Act of 1965, and the post-1990 state legislative and federal executive responses, reflected "an aroused popular conscience that sear[ed] the conscience of the people's representatives" *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting), to make full integration of the American political process a reality.

This Court's decision in *Shaw* was not intended to reverse, and should not have the effect of reversing, this salutary development. In *Shaw*, this Court clearly refused to hold that this race-consciousness rendered *all* districting subject to heightened judicial scrutiny. *See Shaw*, 113 S.Ct. at 2824. Rather, it identified three circumstances under which heightened scrutiny of race-conscious districting is warranted.

*First*, and most importantly, *Shaw* limited judicial intervention to cases where the challenged district is "dramatically irregular," *id.* at 2820, "unusually shaped," *id.*, "extremely irregular on its face," *id.* at 2824, created "without regard for traditional districting principles," *id.*, "bizarre," *id.* at 2825, "irrational," *id.* at 2829, and designed

to "separate voters into different districts on the basis of race," *id.* at 2828. These repeated references were not surplus verbiage. Rather, they were intended to convey the message that black voters were entitled to the same benefits and opportunities in the political process that all other "political, religious, ethnic, racial, occupational, and socioeconomic groups," *Davis v. Bandemer*, 478 U.S. at 146 (O'Connor, J., concurring in the judgment), have traditionally enjoyed. If farmers, for example, or Irish-Americans, or Republicans, or the partisans of a particular aspirant for office have been able to create districts for themselves, then black voters should not be denied the same openings. Thus, *Shaw* required that challenged majority-black districts be viewed in context: are they decidedly *more* irregular than districts that have been drawn for other identifiable voting blocs, both in the past and contemporaneously? As Judge Edmondson's dissent below points out, the Georgia Eleventh Congressional District does not run afoul of this standard: its size is "not particularly noteworthy"; the length of its borders is "not distinctive"; its respect for political boundaries "places the Eleventh at the average for the State's ten other congressional districts"; and its use of "land bridges" is reminiscent of previously drawn majority-white districts within the state. *Johnson v. Miller*, 864 F. Supp. 1354, 1396 (S.D. Ga. 1994). Using one commonly employed measure of compactness, the district is more regular than forty-six other congressional districts. *Id.* at 1397. Under these circumstances, the Georgia Eleventh Congressional District does not fall within the narrow class of districts subject to heightened scrutiny.

*Second*, *Shaw* justified intervention when there was a concrete danger that a district's shape would communicate to elected representatives that "their primary obligation is to represent only the members of [the majority racial] group, rather than their constituency as a whole." *Shaw*, 113 S.Ct.

at 2827. This danger must be proved, rather than simply asserted or presumed:

> "the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election."

*Davis v. Bandemer*, 478 U.S. at 132 (opinion of White, J.); *see also Thornburg v. Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in the judgment); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In a case where the plaintiffs do not allege either that they have been denied the right to vote or that their votes have been diluted on account of race, they should be held to the standard for proving that they have not been adequately represented that was delineated by the *Davis* plurality. No proof was offered in this case to suggest that Representative McKinney has not represented all her constituents fairly or that the political interests of the plaintiffs in this case have been "entirely ignore[d]."

*Third*, *Shaw* suggested intervention might be appropriate if districting practices were shown to be "balkaniz[ing]," *id.* at 2832, that is, if the districting process "segregate[s]" voters on the basis of race, *id.* at 2824, and thereby threatens to "exacerbate ... patterns of racial bloc voting," *id.* at 2827. Again, however, this Court's decisions make clear that polarization cannot simply be assumed; it must be

proved. *Cf. Gingles*, 478 U.S. at 46. Nothing in the record in this case provides any basis for concluding that the contours of the Georgia Eleventh Congressional District have increased the level of racial bloc voting within its territory or have exacerbated racial polarization.

Nothing in *Shaw* suggests this Court intended to give disappointed aspirants for office, citizens across the state, or individuals who simply disagree with the outcome of the political process of districting a roving warrant to spend the remainder of the decade challenging the decennial reapportionment. Clearly, this Court did not intend to leave states "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent ... discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the judgment). The Court was well aware that the Voting Rights Act's various prohibitions on racial vote dilution *require* states to take race into account in the districting process; it was also realistic enough to recognize that legislators would take race into account in any event. *See Shaw*, 113 S.Ct. at 2826. Nor did this Court intend to smuggle in, through the back door, stringent constraints on the partisan aspects of redistricting which this Court had realistically accepted in *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *Davis v. Bandemer*.

Moreover, a broad reading of *Shaw* would seriously subvert this Court's standing doctrine. This Court has repeatedly held that standing is not conferred by "a generally available grievance about government -- claiming only harm to [the plaintiffs'] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lujan v. Defenders of Wildlife*, 112

S. Ct. 2130, 2143 (1992).[1] As *Allen v. Wright*, 468 U.S. 737, 754 (1984), explained, standing requires more than a "shared individuated right to a Government that obeys the Constitution."

Read broadly, *Shaw* would essentially overrule this Court's decision in *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). There, the Court held that a plaintiff who claimed that he could not "properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office" without detailed information about the CIA's budget lacked standing to challenge a statute which relieved the CIA of the obligation to make such disclosures. Richardson's complaint, like the claims of the plaintiffs in *Johnson* and the other post-*Shaw* cases, "is plainly undifferentiated and 'common to all members of the public.'" Of particular salience to this case, *Richardson* recognized, relying on *Ex parte Levitt*, 302 U.S. 633 (1937), that "if [the plaintiff's] allegations were true, they made out an arguable violation of an explicit prohibition of the Constitution. Yet," the Court concluded, "even this was held insufficient to support standing because, whatever Levitt's injury, it was one he shared with 'all members of the public.'" *Richardson*, 418 U.S. at 178. *Richardson*'s analysis can be translated directly into the context of this case:

> It can be argued that if [appellees are] not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the

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[1] *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 881-82 (1983) ("[C]ourts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large.").

> argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the [reapportionment process] by means of lawsuits in federal courts. The Constitution created a representative Government with the representatives directly responsible to their constituents ...; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the "ground rules" established by the Congress [in amending and extending the Voting Rights Act] ... Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.

*Richardson*, 418 U.S. at 179. To confer citizen standing whenever a single individual disapproves of the outcome of the redistricting process -- without requiring that the plaintiff allege *and prove* the specific injuries *Shaw* identified -- would plunge the Court far further into the political thicket than any of its previous forays. *Cf. Davis v. Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment) (criticizing the plurality opinion because under its reasoning voters would be able to challenge apportionments if they lived outside the contested district or, indeed, outside the state).

Accordingly, the Court should take this case as an opportunity to reiterate the limited intervention authorized by *Shaw* and to instruct the lower courts to permit lawsuits challenging majority-nonwhite districts in the absence of any

claim of denial or dilution of the right to vote *only* when such districts both represent a clear departure from the state's normal districting practices *and* threaten either to exacerbate racial bloc voting within the challenged districts or to deny members of the numerical racial minority within the district fair and adequate representation and *only* when the plaintiffs can point to a concrete and particularized injury that *they* have suffered as a result of creation of the challenged districts.

## II. The Differences Between Apportionment and Other Governmental Decisions Show Why Race Can Legitimately Be Taken Into Account in Drawing District Lines

*Shaw* recognized that "redistricting differs from other state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw,* 113 S.Ct. at 2826 (emphasis in original). In fact, the differences between redistricting and other governmental decisionmaking go beyond the legislature's mere awareness of race. These differences explain why race-conscious districting cannot be subjected to the same type of strict scrutiny accorded other race-conscious action.

It is not just with regard to race that different rules apply in the redistricting arena. In *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 74 (1990), for example, this Court invoked the general principle that governmental distinctions among individuals based on their political affiliation are subject to heightened scrutiny; it held that "[u]nless ... patronage practices are narrowly tailored to further vital government interests, we must conclude that they

impermissibly encroach on First Amendment freedoms." Nonetheless, the Court has repeatedly upheld intentional political gerrymanders -- which by definition assign individuals to districts on the basis of political affiliation -- without requiring any special justification. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

The rationale for the different treatment of redistricting lies in the fact that the very purpose of apportionment is to treat voters as members of *groups* and to choose which of their group characteristics should be used to aggregate them for the purpose of electing representatives. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 Mich. L. Rev. 588, 600-01 (1993); Pamela S. Karlan, *The Rights To Vote: Some Realism About Formalism*, 71 Tex. L. Rev. 1705, 1712-13 (1993). Thus, apportionment decisions virtually *never* treat citizens as individuals.[2] Instead, apportionments rely on a series of gross, if politically astute, generalizations about the likely voting behavior of demographically identifiable groups.

By contrast, other sorts of government decisionmaking begin from "the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting) (internal quotation marks omitted;

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[2] Incumbent legislators, their relatives, and major campaign contributors sometimes form an exception to this general rule, and these exceptions can often account for irregularities in district shape. *See* Brief of Appellants Abrams *et al.* (describing how several distinctive geographic features of the Eleventh District reflect legislators' desires to place themselves or family members within particular congressional districts).

emphasis in original). In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for example, the alternative to racial set-asides was awarding contracts to the individual with the lowest competitive bid. In *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), the alternative to using race in deciding which teachers should be laid off was reliance on individual seniority. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the alternative to rigid race-conscious admission to medical school was resort to test scores, prior academic performance, and individual promise within the profession. The Court's analysis rested on two premises: first, that reliance on race can derogate from objective, race-neutral, individualized selection criteria, and, second, that race-conscious treatment may unnecessarily trammel the interests of individual citizens whose legitimate expectations have been foiled.

Neither of these principles operates with the same force on apportionment decisions. First, "[t]he key concept to grasp [about reapportionment] is that there are no neutral lines for legislative districts." *Davis v. Bandemer*, 478 U.S. at 129 n. 10 (opinion of White, J.).[3] There may be a set of "[t]raditional districting principles," *Shaw*, 113 S.Ct. at 2824 -- ranging from such easily measurable criteria as equality of population and contiguity through such inherently subjective criteria as respect for communities of interest and "political fairness." But beyond equipopulosity, there are few "judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. at 217, for deciding the relative weight of these interests with regard to where particular district lines should be placed. The tradeoff among protection of incumbents (with its attendant benefits to a state from

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[3] Quoting Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts* 7-8, in Representation and Redistricting Issue (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).

legislative seniority), geographic compactness, and partisan concerns -- to give just one example -- is a "political question in the truest sense of the word." *Davis v. Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment).

Moreover, given decennial reapportionment and the overtly partisan nature of the redistricting process, voters simply have no "settled expectations," *Wygant*, 476 U.S. at 283-84 (opinion of Powell, J.), about the contours of the district in which they will find themselves. Georgia gained a congressional seat between 1980 and 1990, and uneven growth of population within the state required further adjustments of 1980 district lines. Thus, no voter had any legally cognizable right to be placed in any particular district. Since the votes of the plaintiffs in this case and the other post-*Shaw* litigation were neither denied nor diluted, none of their expectations about the voting process were in any way impaired.

Not only is this Court's concern about objective standards not relevant in the redistricting context, but the second premise of its affirmative action jurisprudence -- that race-conscious behavior distinctively disadvantages the interests of white citizens -- is also inapposite. "Traditional districting principles" have always focused on "the competing claims of political, religious, *ethnic*, *racial*, occupational, and socioeconomic groups." *Davis v. Bandemer*, 478 U.S. at 146 (O'Connor, J., concurring in the judgment) (emphasis added). In the districting process, members of racially-defined groups occupy a position similar to many other politically cohesive groups such as "union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas." *Whitcomb v. Chavis*, 403 U.S. at 155. Such practices as the ethnically balanced ticket are a mainstay of American political history. *See* Pamela S. Karlan, *Undoing*

*the Right Thing: Single Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 35-36 (1991).

As long as all citizens are able to vote and no identifiable group's votes are diluted, the traditional values of descriptive representation and an ethnically diverse cast of elected officials serves a variety of important values. Fair representation of racially defined interests is critical to the functioning of the political process. This insight underlies this Court's racial vote dilution jurisprudence, which recognizes that individuals' policy preferences may often be correlated with, and sometimes even caused by, their racial identity. Much modern legislation is concerned with issues of racial discrimination,[4] and members of racial minority groups may be specially concerned with these issues. "The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." *Wygant*, 476 U.S. at 290 (O'Connor, J. concurring) (quoting S. Rep. No. 92-415, p. 10 (1971)). *Shaw* sought to balance the danger to the perceived legitimacy of government from race-conscious redistricting against the danger to the perceived legitimacy of

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[4] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 214 (codified as amended in scattered sections of 42 U.S.C. (1988)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq. (1988)); Fair Housing Act of 1968, Pub. L. No. 93-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601 et seq. (1988)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. § 2000e(1988); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 et seq. (1988)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (to be codified at 42 U.S.C. § 3601 et seq.); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.).

government posed by lily-white legislative delegations from racially diverse jurisdictions. The decision in this case and in its companion lawsuits from Texas and Louisiana stems from the lamentable blindness of the district courts to the latter danger.

Finally, in contemporary America, it may be impossible fairly to represent ostensibly "political" interests if ethnicity is ignored. In the real world race often serves as a shorthand or organizing principle for political communities of interest. Consider, for example, blacks in Marion County, Indiana. In *Whitcomb v. Chavis*, residents of inner-city Indianapolis challenged the state's use of multi-member state legislative districts, claiming that the scheme produced unconstitutional racial vote dilution. This Court disagreed: black voters lost not because they were *black*, but because they were *Democrats*: "The voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." 403 U.S. at 151. In *Davis v. Bandemer*, black residents of inner-city Indianapolis again challenged the Indiana scheme and again lost because their overwhelming support of Democratic candidates showed that it was politics, not race, that caused their exclusion. 478 U.S. at 118 n. 8. But in response to a post-*Gingles* challenge under section 2 of the Voting Rights Act to the very districts upheld in *Davis*, the state agreed to abandon its multimember scheme and create several majority-black single-member districts. *See Dickinson v. Indiana State Election Bd.*, 817 F. Supp. 737 (S.D. Ind. 1992) (recounting the history of the section 2 litigation).

This overlapping of racial and political affiliations is a commonplace in contemporary politics. *See also LULAC v. Clements*, 999 F.2d 831, 850-55 (5th Cir) (en banc) (determining that black candidates for judicial office lost because they were Democrats, not because they were black),

*cert. denied*, 114 S Ct 878 (1994). The decision by the unsuccessful Republican plaintiffs in a political gerrymandering challenge to North Carolina's congressional reapportionment, *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) (three-judge court), *aff'd*, 113 S.Ct. 30 (1992), to recast themselves as plaintiff-intervenors in *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994) (three-judge court), is another pointed illustration of this reality.

Given the intertwining of race and politics, an expansive rule that treats all race-conscious districting with suspicion raises serious questions of administrability. Suppose, for example, that Democrats had controlled the Indiana reapportionment process and that they had drawn districts that had advantaged Democrats, including the overwhelmingly black Democratic community of inner-city Indianapolis, and that white suburban Republicans challenged the plan. Would the level of judicial scrutiny depend on a federal court's ability to disentangle the political and racial aspects of the legislature's decision? Would plans that favor black Democrats be accorded more searching scrutiny than plans that advantaged white Democrats? Such as result would, we suggest in the next section, raise serious constitutional questions.

## III. *Shaw v. Reno* Must Be Read Narrowly to Avoid Denying African Americans the Equal Protection of the Laws Guaranteed by the Fifth Amendment

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a provision of the Akron City Charter that provided that:

> "Any ordinance enacted by the Council of The City of Akron which regulates the use, sale,

> advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective."

Akron City Charter § 137. The Court explained that the fatal weakness in the ordinance was that it "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations" and those involved in "the pursuit of other ends." 393 U.S. at 390. The "reality" of such a provision, the Court explained, is that "the law's impact falls on the minority" because they are more likely to "benefit from laws barring racial, religious, or ancestral discriminations ...." *Id.* at 391. Section 137 involved impermissible discrimination on the basis of race, the Court concluded, because "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

Suppose a state were to pass a statute declaring that "any group of voters shall be entitled to petition the legislature to draw a congressional district in which members of the group form a majority of the electorate: *Provided*, That if the primary common characteristic of the group is the race or color of its members, the group shall be entitled to constitute the majority in a district only if it can persuade the legislature to draw a district with a dispersion score of .40 or

above or a perimeter score of .30 or above."[5] Such a statute would clearly run afoul of *Hunter*, because it would treat voters who politically affiliate along racial lines differently from voters who choose to affiliate along other shared characteristics, and would make it more difficult for them to secure favorable apportionment plans. And although the hypothetical statute might be race-neutral on its face, this Court would surely conclude that in reality it would burden black voters more heavily, since racial bloc voting and their shared interest in governmental policies to combat racial discrimination make them especially likely to seek race-conscious apportionments that provide them with majority-black districts. Such a hypothetical law, like the provision in *Hunter*, would make it more difficult for black voters than for other groups to enact favorable apportionment legislation, since it would constrain their available options in ways that other groups' options were not constrained.[6] To uphold such an ordinance would turn the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries.

If that hypothetical statute would violate the Fourteenth Amendment -- as clearly it would -- then a similar federal judicially created rule would also run afoul of the Constitution. Federal courts are bound by the equal protection component of the Due Process Clause of the Fifth

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[5] For descriptions of these technical terms for measuring compactness, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 553-56 (1993).

[6] Just as clearly, a statute that provided that "a majority-white district may be any shape but a majority-black district must be regular in its boundaries," would clearly violate the equal protection clause.

Amendment. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). Thus, the federal courts cannot place unique barrier in the path of black voters' seeking legislative plans of their choice.

If *Shaw* is read narrowly, it certainly does not conflict with the Fifth Amendment's guarantee of equal protection. Under such a reading, the Constitution simply requires heightened scrutiny for race-conscious districting when the outcome of the process is districts that are never drawn for other groups. But if *Shaw* is read broadly, as the courts below have shown themselves prone to do, such a reading poses serious equal protection problems. To render districts suspect when they are drawn at the behest of the black community -- when farmers, Republicans, incumbents, "North Louisiana English-Scotch-Irish," *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (three-judge court), *probable juris. noted*, Nos. 94-558 and 94-627, can obtain equivalently shaped districts -- poses precisely the equal protection threat identified in *Hunter*. This Court should make clear that black voters are entitled to an equal opportunity to participate in the redistricting process and to benefit from the kind of traditional districting practices, including the drawing of oddly shaped districts, that all other political groups enjoy.

## CONCLUSION

The decision of the district court represents both an incorrect reading of this Court's opinion in *Shaw v. Reno* and an unwarranted federal judicial intrusion into the political process. Accordingly, this Court should reverse the judgment of the court below and remand the case with directions to dismiss the plaintiffs' complaint.

Respectfully submitted,

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